## 1 Jury Selection in a DUI Case

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## 2 Insanity: doing the same thing over and over again and expecting different results.

#### 3 Top 10 Mistakes

## 4 **10.** Interrogation of jurors

• Jurors should be asked questions that identify potential bias, but shouldn't be made to feel like they are a murder suspect.

## **9. Bonding with just a few jurors**

• It's easy to focus on the jurors who smile at you and give you all the good answers, but chances are that juror won't be around long. Besides, the other jurors get "jealous."

## 6 8. Refusal to ask the tough questions about case weaknesses

• You can't ignore the big elephant in the corner. If your case has a weakness (and <u>all</u> cases have them) then you have to address those issues in voir dire. The key is drafting a good guestion!

## 7 7. Allowing the Court to conduct all the voir dire

• Attorneys establish rapport and credibility with jurors during voir dire. Attorney conducted voir dire is essential and adds weight to that opening statement you spent so many hours writing and rehearsing!

## 8 6. Failure to use voir dire to advance your case.

- The State should be the one framing the issues.
- If you let the defense frame the issues, you will be playing 'catch up' the entire trial.

#### 9 5. Talking "down" to jurors

Yes it's true that as a whole jurors read and understand info at about an 8<sup>th</sup> grade level

 however, they can smell arrogance a mile away and will hold it against you and your client.

### 10 4. Failing to keep an open mind to their honest responses

- Attorneys need to practice their poker faces before voir dire. If you react negatively to an answer they give, they will either:
  - Start lying to make you happy
  - Stop answering your questions
  - Adopt an attitude of defiance

## 11 3. Failure to use good social skills

- This is the time and place to use your social skills. Smile and (if appropriate) joke with the jury panel <u>a little</u>. Remember, the goal is to encourage full disclosure, so they need to like and trust you.
- Think of it as a party full of strangers, work at putting them at ease and everyone will have a good time.

### 2. Waiting till the last minute to draft your voir dire questions

- Unless you have a vast data base of voir dire questions at your disposal, you should not be drafting your voir dire the night before trial.
- But if you do, call a trial consultant or other prosecutors (NDAA, APAAC) with a vast data base.....

## 13 1. Failing to believe voir dire is essential to jury selection

• "Just give me the first 12 pair of shoes that walk in the door....." That statement is pretty scary.

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## 14 Do you get a jury?

#### 15 United States Constitution

- 6<sup>th</sup> Amendment:
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  - •

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed..."

## 16 Arizona Constitution

- Article 2, § 23
  - The right of trial by jury shall remain inviolate.....
- 2 Article 2, § 24
  - In criminal prosecutions, the accused shall have the right...to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

#### 17 Arizona Revised Statute

- ARS §13-114:
- - In a criminal action defendant is entitled:
    - 1. To have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed.

## 18 What they didn't teach you in Law School about Jury Selection

## 19 General Principles

#### 20 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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You need to look/ act 'squared away' so that jurors will think your case is too.

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#### 21 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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- Dress Appropriately

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### 22 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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## 23 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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Table MUST always look organized!

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## 24 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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- Make eye contact.
- Use plain English.
- Listen to jurors / judge.
- Present a positive image.

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### 25 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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- Be confident!
  - Jurors can sense when you are not confident, it bleeds into the rest of your case.
  - Appearing confident = credibility / confidence in your case because you should prevail.
  - Nervous / fearful behaviors (or those that can be interpreted as such) do not project credibility.

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### 26 FIRST IMPRESSIONS ARE DIFFICULT TO CHANGE

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- Sit up right.
- Don't tap your fingers on table or engage in other annoying habits.
- Watch your body language.
- Do not invade juror's space.
- Be polite to all jurors!

#### 27 START WITH A PLAN

- Case Analysis
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- Approach

- •
- Preparation
- •
- Execution

### 28 CASE ANALYSIS

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- Taking a hard look write it out
  - Understand your case
  - Strengths
  - Flaws

## 29 Looking at the Good, the Bad and the Ugly

**Development of Profiles** 

## 30 What are Your Strengths & Weaknesses?

- Jurors' reactions to the strengths and weaknesses of your case also are a source of potential bias
- You must address both in design of voir dire and de-selection of your jury

## 31 APPROACH

- Understanding your jurors
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- Bias's
- Attitudes

### 32 Understanding Jurors

- First seek to understand and then be understood
- Jury system unique
  - Entrusts most difficult disputes to people who are strangers and ill equipped
  - Child emperors

#### 33

- Experiences
- Attitudes
- Bias
- Tendencies
- View of the world
- Opinions
- Motives
- Process of information do they understand?
- Rule of thumb EAR method

### 34 Use the E.A.R Method

- Experience
  - •
- Attitude
- •
- Rules (what did they learn as a result of this experience)

### 35 Use the E.A.R Method

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- Experience
  - Have you or anyone close to you ever been stopped by the police for driving while impaired?
  - What happened as a result?

### 36 Use the E.A.R Method

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- Attitude
  - How did you feel about this happening to you / someone close to you?
  - •

## 37 Use the E.A.R Method

- Rules (what did they learn as a result of this experience)
  - Were you satisfied with the end result of this incident?
  - Did you feel like you / close one were treated fairly throughout the process?
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- Jury Research Key areas of bias
- Governmental Agencies
- Police
- Intrusive Laws / Rules 'Libertarian bent'
- Distrust / Ignorance of Science
- Experience in the criminal justice system
- Unrealistic Expectations
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  - •
  - Jury Research in Maricopa County (ongoing since 2006):
    - 68% of jurors have either been arrested / convicted for DUI, or someone close to them has been arrested or convicted.
      - Strong feelings of bias against the State is reported from 30% of those jurors.
- 40
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- How to uncover juror bias:
  - •
  - •
  - Experiences
  - Affiliations
  - Attitudes / Strong Feelings
  - Level of Education
- •
- 41
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- Tendencies for Pro-State Jurors:
  - •
  - Safety Conscious

- Worries about personal safety for themselves and loved ones.
  - •Ex wear seat belts, child car seats until age 8....
- Have fewer than 2 moving violations in the past 8 years.
- Do not drive motorcycles
- Conservative / law and order types

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- Tendencies for Pro-State Jurors:
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  - Believes strongly in personal accountability and responsibility
  - Is trusting and believes in the system
  - Rule followers

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- Tendencies for Pro-Defense Jurors:
  - Those who drive for a living.
  - Those who drive more than 20,000 miles a year.
  - Risk takers.
  - Over identification with the defendant sympathetic.
  - Looking for loop holes.
  - CSI / TV science.
  - Distrustful of government.
  - Is misinformed or has unrealistic expectations.

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#### 45 PREPARATION

- Draft questions that specifically address case issues.
  - Be creative
  - Be relevant
  - Don't be afraid to tackle the tough questions / issues

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### 46 PREPARATION

- Develop profiles
  - Characteristics
  - Jury chemistry

### 47 PREPARATION

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- Drafting questions
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- Attorney Conducted Voir Dire
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- Supplemental Juror Questionnaire sell this to Court
- •
- Combination of both
- •

### 48 PREPARATION

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- What do you want to know?
- - "What" questions reveal factual data.
  - "Why" questions reveal a juror's reasoning.
  - "How" questions usually reveal a juror's true feelings.
    - Do you have strong feelings about the way the police enforce DUI laws?
- Attorney Conducted Voir Dire
- •
- Supplemental Juror Questionnaire sell this to Court
- •
- Combination of both
- •

## 49 PREPARATION

- Open end versus close ended questions
- Drafting an outline of your voir dire
- Write them out
- Practice your questions
  - Are they well worded?
  - Are they offensive?
  - Are you following the EAR format?

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## **Profiles of Characteristics**

- Leader
  - Experienced
  - Sensitive
  - Cautious
  - Humble
  - Idealistic
  - Creative
  - Sociable
    - •
- Trusting
  - Calls self an expert
  - Talker

- Reads instructions
- Civic minded
- Follower
- Arrogant
- Logical

## 51 EXECUTION

- Interpersonal Skills
- Are you a good listener?
  - #1 difficulty with voir dire
  - •
- Goal is to make them talk.
- Don't go straight down the row, jump around...keeps jurors on toes and listening.
- Prompt juror candor

## 52 **EXECUTION**

# 53 EXECUTION

- Trust
  - Building rapport
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- What do you really want to know?
  - What/why/how
- •
- \_
- Script and Outline

### 54 **EXECUTION**

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- Voir Dire techniques:
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  - •
  - Start broad asking questions that appeal to the largest audience then narrow in on jurors who you are unsure about or need more specific information.

## 55 EXECUTION

- •
- Voir Dire techniques:
- •
- Use the phrase "do you have strong feelings about?"
- Using voir dire to educate the jury.
  - •BAC limit .08
  - Illegal to be impaired and be in Actual Physical Control
  - Prescription drugs impair....

## 56 Questions – digging for information

- Questions that uncover the characteristics of profiles
- Questions that address your bad facts
- Sources:
  - experiences
  - opinions, beliefs, and values
  - what they learned as a result

watch nonverbal communication

## 57 **Demographics**

- The jurors' backgrounds consist of a variety of information, including such factors as:
  - race,
  - gender,
  - occupation,
  - education, and
  - organizational membership. While it's a starting point You need much more
  - Background information comes primarily from judge voir dire (and in some cases, juror questionnaires)

## 58 **Experiences**

- Jurors have had a variety of experiences that may have shaped their viewpoints as they
  pertain to your case. Potential biasing experiences can be divided into several
  categories:
  - (a) experiences that lead to viewing the defendant and/or defense witnesses more favorably,
  - (b) experiences that lead to viewing the victim and/or the state's witnesses in a negative light, and
  - (c) experiences that lead to viewing the actions of the victim positively.

#### 59 Similarities and Over-Identification

- Can jurors with similar backgrounds as a party (victim, witness or defendant) lead them to view the party or witness more or less favorably?
- Would coming from certain upper socioeconomic status groups lead to possession of more calloused, anti-victim attitudes?
- Ask the questions don't just assume!

## 60 General opinions

- General opinions refer to the more global views, values, and opinions that jurors hold.
  - These views can reflect personality characteristics or traits of jurors, such as beliefs in distributive justice or perceptions of control over their lives, or general views that may have an indirect connection to your case.
- While general opinions are usually less accurate than case-specific opinions in identifying bias, they are useful components in the search for bias.

## 61 Case-specific Opinions

- These opinions are directly related to some aspect of the case, such as the theme, circumstances of the case, or bias concerning a party or witness.
- These opinions have the potential to be more effective in identifying bias because they are more directly connected to the decisions that jurors will make.

## 62 The order is important

- Ask your questions in the order of their biasing power, starting with the factors that tend to exert the most bias, as follows:
  - (a) experience/relationships
  - (b) feelings
  - (c) thoughts and opinions.

### 63

• Introduce new voir dire topics with general questions about personal experiences when appropriate, but remember experience questions can paint the target for your opponent,

so you must be careful.

• Always ask experience questions in the direction of negative biases

## 64 What if Background is All You've Got?

- Recognizing the errors inherent in making generalizations based on gross background characteristics - sometimes we are unable to ask jurors directly about certain critical experiences or opinions:
- Background characteristics can serve as indicators of certain jurors
- If you are unable to investigate satisfactorily the jurors' views, you would not want to ignore certain background characteristics

## 65 The "Hard" Questions

- Should you be using a SJQ?
- Bench/private conference?
- Is it hard because you're afraid of the answer?
- What do you really want to know?
  - Simplify
  - Identify the experience and follow with the attitude
  - What happened and how did you feel about it?

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## 66 Questioning Techniques

## **Put your Interpersonal Skills to Work**

- The goal make them talk
- Don't go straight down the row... remember law school keep jurors on their toes/no zoning out
- Narrow focus?
  - Struck or strike and replace method
- Promote juror candor
- Use the loop method

### 67 Do's and Don'ts

## 68 Foster Participation Early and Often

- Keep jurors involved and participating in the voir dire process, particularly when questioning is conducted in group format.
- Break the tendency for jurors to be reluctant to participate in the process by getting all jurors involved early.
- Use "breaking the ice" technique which has all jurors raise their hands at the start of voir dire.
- Ask questions that all jurors are required to answer affirmatively (e.g., asking how many jurors have lived in the area for the past two years).
- Once jurors are participating keep them involved



• Never follow-up on <u>favorable answers</u>. When a juror's answer favors your side of the case---you must absolutely <u>never ever</u> ask who else feels the same way or who else agrees as you will be painting targets for your opponent



• Try to avoid or use sparingly questions that call for a yes or no response. They are usually of little or no diagnostic value and often confound accurate juror diagnosis. Similarly, avoid conformity-biasing questions such as "Wouldn't you agree...?"

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• If someone says something that is bad for your case, don't cut them off! Find out who

agrees with them.

- Never ever try to find out who disagrees with a juror expressing an unfavorable or negative position, as you will be painting the target—the jurors who are favorable to your case---for your opponent.
- If someone says something that bodes well for your case, find out who disagrees with them.

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Do not worry about poisoning the panel. It's better to hear the "bad stuff" out in the court room, so that you can deal with it, rather than have it come out in the jury room, where you have no control.

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- Avoid the temptation to use voir dire as an opportunity to indoctrinate your jurors.
- Introduce case themes instead
- Keep in mind that your primary goal is to surgically remove the bad jurors. If you fail to remove the dangerous jurors your case will die before you get it to the operating table.

## 74 **Evaluating the Information**

- Cause
- Preemptory strike
- Organize the information
  - Gut feeling
  - Not for inappropriate reasons
  - Some reasonable basis
- Adjust your expectations

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## 75 Practical Aspects of Organizing the Information Obtained

- Assistance from co-counsel/2<sup>nd</sup> chair
  - Paralegal
  - Case agent
  - Victim witness Advocate
  - SJQ analysis
  - Juror charts
- Using a rating system
  - Must not be static
  - •+++
  - •++
  - +
  - 0 • X
  - XX
  - XXX

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### 76 Let's Talk SJQs

Are they worth the work?

YES!

## 77 Benefits of Using a Supplemental Juror Questionnaire

- It encourages full disclosure by jurors
- It provides for privacy of individual disclosures
- Ensures responses from each and every juror
- Elicits full disclosure without tainting your jury or boring the other jurors
- Provides a "big picture view" of your jury panel
- Provides for jury selection strategy

## 78 I have an SJQ – now what?

- Overwhelming amount of information
- ullet 1st identify juror for cause time saver
- SJQ sheets get help/highlight and flag
- Ranking
- Identify follow up questions and design personalized questions
- Identify those that just have to go

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	Suppose you were a juror and were told that one side had the responsibility or burden of proving its case. If that side failed to prove its case according to the law, but you thought that side was right, what do you think you would do?
	Have you ever served as part of an investigative committee assigned the task of determining if a person's behavior was proper (for example, to see if someone broke thrules at work, church, etc.)?  Yes  No
	IF YES: Please explain how you conducted your investigation
	In the course of your employment are you or have you been required to conduct internal investigations on fellow employees?
80 🔳	How serious a problem do you think crime is in your neighborhood? Very seriousSeriousNot so serious
	very seriousseriousnot so serious
	Have you ever moved or considered moving because you thought crime was a problem in your neighborhood?YesNo IF YES: Please explain
	<del></del>
	•
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- Use a juror rating sheet that allows you to record and rate jurors' responses in terms of their biasing power.
- Remember: Experiences, including the experiences of family, friends, co-workers and membership groups (etc.), trump all other factors in biasing power.

## 82 Deselecting your Jury

- Voir dire only
- SJQ and Voir Dire
- Cause
- Identification of:
  - Those who don't work well in a group
  - Fit your profile/fit your pro-defendant profile
  - Dishonest jurors
  - Jurors who won't/can't accept the facts of the case

## 83 Organize your Analysis

## 84 Learn from the Past

- Post Verdict Interviews
- Preferable to be done by someone other than yourself become the student
  - Check anger and ego at the door
- Always ask to interview the jurors
- Written questionnaires to jurors remember to include self addressed stamped envelope
- Learn from mistakes honest evaluation of feedback
- Share with training supervisor for future training

#### 85 Latest Research

- Media
- Cell phones
- Social Networks
- Reality Stars
- Blogs
- "Real World" Syndrome
- Unrealistic expectations with technology
  - CSI Effect
- Jurors and Google
  - Used to 24 hour access to information
- Juror Misconduct on the rise

#### 86 Jurors: Now & the Near Future

- Cynical
- Impervious
- Suspicious
- More cautious
- More social
- Information starved
- Voyeuristic
- Views the glass as half full

#### 87 LEARNING FROM MISTAKES

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- Watch others / others watch you
- Talking to jurors post verdict

- Compile data
- Acceptance of mistakes
- Good facts versus bad jury....

# 88 Thank you for your time and attention

Questions?